U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 16 2006

EAC 04 096 52192

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The director reopened the matter on motion and ultimately denied the petition again. The matter is now before the Administrative Appeals Office (AAO) based on two appeals, one of which was filed before the director's final decision. The first appeal, EAC-05-104-51367, will be dismissed as moot. The second appeal, EAC-05-241-50431, will be dismissed on its merits.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(ii), as an alien physician. The petitioner asserts that the beneficiary is an alien physician who has agreed to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals.

In his initial decision, dated January 29, 2005, the director found the beneficiary ineligible for classification as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, the classification indicated on the petition. On February 18, 2005, the petitioner filed a motion noting that the cover letter accompanying the petition clearly requested classification pursuant to section 203(b)(2)(B)(ii) of the Act and requesting that the matter be reopened and reconsidered under that classification. On March 1, 2005, the petitioner filed the first appeal. In a supplementary brief dated March 28, 2005, prior counsel requested that the AAO remand the matter to the director for consideration under section 203(b)(2)(B)(ii) of the Act. On April 19, 2005, the director reopened the matter and requested additional evidence relating to section 203(b)(2)(B)(ii) of the Act. The petitioner responded on July 12, 2005. On August 3, 2005, the director denied the petition again, concluding that the beneficiary was not eligible for classification under section 203(b)(2)(B)(ii) of the Act.

The petitioner's only request in the first appeal is that the AAO remand the matter to the director for consideration under section 203(b)(2)(B)(ii). This request, however, is moot as the director reopened the matter and took the action for which we are requested to remand the matter, consideration pursuant to section 203(b)(2)(B)(ii). As such, the first appeal must be dismissed as moot.

In the second appeal, the petitioner challenges the director's final decision under section 203(b)(2)(B)(ii). The merits of this appeal will be addressed below.

Section 203(b) of the Act, as amended, provides:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare

> of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B)(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.
>
> > (ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--
> >
> > > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
> > >
> > > (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The regulation at 8 C.F.R. § 204.12(a) provides:

> *Which physicians qualify?* Any alien physician (namely doctors of medicine and doctors of osteopathy) . . . .

The regulation at 8 C.F.R. § 204.12(c)(4) provides:

> Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

The beneficiary has a doctor of chiropractic. The beneficiary's transcript reflects eight trimesters of coursework. The director concluded that the beneficiary was not a doctor of medicine or a doctor of osteopathy. The director further concluded that the beneficiary was inadmissible as an "unqualified physician."

On appeal, the petitioner asserts that chiropractic care is part of the medical profession, that the beneficiary's degree is the equivalent of a doctor of osteopathy and that he is licensed to practice as a chiropractor. Whether the beneficiary is a medical professional is irrelevant. For example, nurses are medical professionals but are not covered under this classification. Significantly, doctors of osteopathy

are medical professionals, but the regulation specifies both doctors of medicine and doctors of osteopathy. Thus, we presume the regulations to require one of the two actual degrees specified, a doctor of medicine or a doctor of osteopathy. The beneficiary has neither. The regulations make no provision for "equivalent" degrees. As such, the beneficiary is not a qualifying physician.

In addition, the commentary to the relevant interim regulations at 65 Fed. Reg. 53889 (2000) provides:

> While the statutory language says "any physician," the Service notes that HHS currently limits physicians in designated shortage areas to the practice of family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. Unless HHS establishes shortage areas for other fields of medicine, only these fields of medicine are covered by this rule.

The shortage designation for the petitioner's location reflected in the record is primary care. The beneficiary is not practicing primary care medicine or in any of the above areas of medicine. Rather, the beneficiary is a chiropractor. Thus, he is not eligible for the physician national interest waiver.

Regarding the beneficiary's admissibility, section 212(a)(5)(B) applies to graduates of unaccredited medical schools. The beneficiary is not a graduate of a medical school, accredited or otherwise, but a chiropractic college. He has submitted evidence that he is licensed to practice chiropractic care. As such, it is not clear that the beneficiary is inadmissible as an unqualified physician, but only because he did not graduate from any medical school, accredited or unaccredited. The inclusion of this ground of inadmissibility in the regulations, however, suggests that the visa classification is limited to medical school graduates.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The regulation at 8 C.F.R. § 204.12(c)(3) requires the submission of:

> A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.
>
> > (i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.

> (ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.

In response to the director's notice of reopening and request for additional evidence, the petitioner submitted a letter from his Congressman. Congress is not a federal "agency" and the congressman does not provide his background in making determinations on matters involving medical affairs. On appeal, the petitioner submits an August 22, 2005 letter from the Office of the Governor of Maine. First, the letter is not dated within six months prior to filing the petition. Regardless, the governor's office is not a public health department of the State of Maine. Thus, the petitioner has failed to comply with the regulation at 8 C.F.R. § 204.12(c)(3).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has not sustained that burden. For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeals are dismissed.